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13 **UNITED STATES BANKRUPTCY COURT**

14 **DISTRICT OF NEVADA**

15 In re

16 Case No. BK-23-10423-mkn

17 CASH CLOUD, INC., dba COIN  
18 CLOUD,

19 Chapter 11

20 Debtor.

21 **DEBTOR'S OPPOSITION TO MOTION  
22 TO CONVERT CASE TO CHAPTER 7**

23 Hearing Date: September 13, 2023

24 Hearing Time: 9:30 a.m.

25 Cash Cloud, Inc., dba Coin Cloud (the “Debtor”), debtor and debtor in possession in the  
26 above-captioned Chapter 11 case (the “Chapter 11 Case”), by and through its counsel, Fox Rothschild  
27 LLP, hereby files this *Opposition* (the “Opposition”) to the *Motion to Convert Case to Chapter 7*  
28 [ECF No. 1034] (the “Motion”) filed by Chris McAlary (“McAlary”).

29 This Opposition is made and based upon the *Declaration of Daniel Ayala* (the “Ayala  
30 Declaration”) filed concurrently herewith, the points and authorities set forth below, the papers and  
31 pleadings on file with the Court, and any oral arguments the Court may entertain at the hearing on the  
32 Motion.

## I. INTRODUCTION

1. After having run the Debtor into the ground – to the point where its assets were worth more than its business as a going concern – McAlary resigned as CEO. He now persists in seeking conversion of the Chapter 11 Case (that he directed be filed) over the express vote of the creditor body to the contrary,<sup>1</sup> the Court’s confirmation of the Debtor’s liquidating plan,<sup>2</sup> and the Court’s direction that “a Chapter 11 debtor’s business judgment to liquidate in Chapter 11, rather than converting to Chapter 7, should be given considerable weight, especially if it is supported by an official committee of unsecured creditors.”<sup>3</sup>

2. Under McAlary's supervision, the Debtor suffered over \$11 million in operating losses during the first three months of the bankruptcy,<sup>4</sup> in addition to damages (asserted at \$25+ million) associated with his alleged breaches of fiduciary duty and fraudulent transfers occurring prior to and during the Chapter 11 Case.<sup>5</sup> Despite repeated requests, McAlary has also refused to repay the outstanding loans he owes the Debtor in excess of \$700,000. *See Ayala Declaration, ¶ 4.*

3. The only plausible reason why McAlary favors conversion must be his expectation that the Chapter 7 trustee's lack of familiarity with the Debtor's business and McAlary's role in unravelling it will work to his favor in combatting the claims against him.

4. As the Court is well aware, the Debtor sold substantially all of its assets after an extensive marketing process ending in an auction on June 2, 2023.<sup>6</sup> Although the initial, non-binding

<sup>1</sup> See Declaration of Angela Tsai of Behalf of Stretto Regarding Solicitations of Votes and Tabulation of Ballots [ECF No. 1077].

<sup>2</sup> See Order: (A) Approving Debtor’s Disclosure Statement [ECF No. 529] on a Final Basis; and (B) Confirming Debtor’s First Amended Chapter 11 Plan of Reorganization Dated August 1, 2023 [ECF No. 996] [ECF No. 1126] (the “Confirmation Order”), confirming Debtor’s First Amended Chapter 11 Plan of Reorganization Dated August 1, 2023 [ECF No. 996] (the “Amended Plan”).

<sup>3</sup> See Order on Objection to Debtor's First Amended Chapter 11 Plan of Reorganization Dated August 1, 2023 [ECF No. 1120] (the "Order Overruling Confirmation Objection"), at p. 4.

<sup>4</sup> See Monthly Operating Report for April 2023 [ECF No. 901].

<sup>5</sup> See Exhibit A to *Response of the Official Committee of Unsecured Creditors to Opposition to Approval of Stipulation Granting Derivative Standing to the Official Committee of Unsecured Creditors with Respect to Certain Actions* [ECF No. 1073] (“Committee Response”).

<sup>6</sup> See Order [Approving Sale Motion] [ECF No. 795].

1 term sheets were in the \$16 million range,<sup>7</sup> after the bidders performed limited due diligence on the  
 2 Debtor's assets and operations, they dropped their bids precipitously.<sup>8</sup> In the end, the market decided  
 3 that an asset sale would provide maximum value to the estate, with a combined bid of \$5.7 million  
 4 selected as the winning bid at the conclusion of the auction.<sup>9</sup> That bid was further reduced after more  
 5 extensive due diligence revealed that many of the assets were not in working condition.<sup>10</sup>

6       5. On June 12, 2023, the Debtor ceased operations. That same day, McAlary resigned as  
 7 the Debtor's CEO. *See Ayala Declaration, ¶ 5.*

8       6. The Debtor's remaining assets consist largely of cash (including some remaining to be  
 9 collected from the purchased DCMs), surcharge claims against the secured creditors' sale proceeds,  
 10 accounts receivable (including over \$700,000 from McAlary), and causes of action, including claims  
 11 against third parties, claims against McAlary (with asserted damages of \$25+ million), and avoidance  
 12 actions. *See Ayala Declaration, ¶ 6.*

13       7. The sole question posed by McAlary's Motion is who should oversee the liquidation  
 14 of the remaining assets: the existing Chapter 11 professionals, who have developed substantial  
 15 familiarity not only with the Debtor's business, but also with the outstanding causes of action, or a  
 16 Chapter 7 trustee?

17       8. The creditors have made their preference abundantly clear: 189 unsecured creditors,  
 18 holding over \$115 million in debt (over 95% in number/amount), have voted for the liquidation of  
 19 the Debtor's remaining assets to be supervised by the estate's current professionals pursuant to the  
 20 terms of the Amended Plan.<sup>11</sup>

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 22       <sup>7</sup> *See Notice of Designated Stalking Horse Bidder [ECF No. 473] & Exhibit 1 thereto.*

23       <sup>8</sup> *See Amended Notice of Designated Stalking Horse Bidder [ECF No. 605] & Exhibit 1*  
 24 *thereto.*

25       <sup>9</sup> *See Notice of Auction Results Regarding Sale of Substantially All of the Debtor's Assets*  
 26 *[ECF No. 618, corrected by ECF No. 621].*

27       <sup>10</sup> *See Ayala Declaration [in Support of Objection to Enigma Administrative Expense Claim]*  
 28 *[ECF No. 988], ¶ 7.*

29       <sup>11</sup> *See Declaration of Angela Tsai of Behalf of Stretto Regarding Solicitations of Votes and*  
 30 *Tabulation of Ballots [ECF No. 1077].*

1       9.     The Court has also answered this question in favor of the estate’s current professionals  
 2 by confirming the Amended Plan and finding that it meets the “best interests” test of Section  
 3 1129(a)(7), *i.e.*, that dissenting creditors would receive at least as much under the Amended Plan as  
 4 they would in a Chapter 7 liquidation.<sup>12</sup> The Court observed that “[b]ecause the administrative  
 5 expenses of bankruptcy, whether in Chapter 11 or in Chapter 7, are paid if at all ahead of non-priority,  
 6 unsecured claims, there is limited benefit in incurring additional priority administrative expenses by  
 7 conversion to Chapter 7 if the same approach to recovering estate assets must be pursued. Thus, a  
 8 Chapter 11 debtor’s business judgment to liquidate in Chapter 11, rather than converting to Chapter 7,  
 9 should be given considerable weight, especially if it is supported by an official committee of  
 10 unsecured creditors. In this instance, the official Creditors Committee as well as over 95% of the  
 11 nonpriority unsecured creditors casting ballots support confirmation of the Amended Plan.”<sup>13</sup>

12       10.    Nevertheless, McAlary, as the holder of Debtor’s worthless stock, an asserted  
 13 \$1.7 million general unsecured claim,<sup>14</sup> and an asserted \$136,961 administrative claim<sup>15</sup> (to which  
 14 the Debtor intends to object), seeks to convert the Chapter 11 Case to Chapter 7. Conversion would  
 15 entail the appointment of Chapter 7 trustee and his/her own set of professionals, all of whom would  
 16 be required to spend significant time to climb the steep learning curve – in addition to the time the  
 17 existing Chapter 11 professionals would spend transferring data and legal analysis to the new  
 18 trustee/professionals.<sup>16</sup>

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 22       <sup>12</sup> See Confirmation Order, p. 5, ¶ 19.  
 23       <sup>13</sup> See Order Overruling Confirmation Objection, p. 4.  
 24       <sup>14</sup> See Proof of Claim No. 123 (\$1,721,763 total claim, \$15,150 of which asserted as priority).  
 25       <sup>15</sup> See ECF No. 894 (asserting administrative priority expense claim in the amount of  
 26 \$136,961.48, \$105,617.04 of which is for indemnification of legal fees and expenses)  
 27       <sup>16</sup> See Memorandum of Law in Support of [Confirmation of Amended Plan] [ECF No. 1078]  
 28 (the “Confirmation Memorandum”), at pp. 31-32, 43-46; and Declaration of Tanner James in Support  
 of [Confirmation Memorandum] [ECF No. 1079] (the “James Declaration”) & Exhibit 1 thereto  
 (liquidation analysis).

1           11. Moreover, without the continued oversight of the existing Chapter 11 professionals,  
 2 the Debtor's remaining assets are likely to decrease in value, including the residual cash in the DCMs,  
 3 claims against the Debtor's D&O policy, causes of action, and avoidance claims.<sup>17</sup>

4           12. For the reasons and based on the authorities set forth below, the Debtor respectfully  
 5 submits that the Motion must be denied.

## 6           II. ARGUMENT

### 7           A. McAlary Fails to Carry his Burden of Demonstrating "Cause" for Conversion

8           Section 1112 authorizes the Court to order the conversion of a Chapter 11 case only "for  
 9 cause." 11 U.S.C. § 1112(b)(1). Notably, "the movant bears the initial burden of demonstrating that  
 10 cause exists to convert the Chapter 11 case to Chapter 7 . . ." 7 *Collier on Bankruptcy* ("Collier")  
 11 ¶ 1112.04[4] (16<sup>th</sup> ed. 2022 rev.).

12           McAlary argues that cause for conversion exists, due to "substantial or continuing loss to or  
 13 diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C.  
 14 § 1112(b)(4)(A).

15           As evidence of substantial loss, McAlary points to the Monthly Operating Report for the  
 16 period ending April 30, 2023, reporting losses totaling \$11,968,635. Motion, p. 15. McAlary  
 17 contends that the loss is continuing by listing every monthly fee application filed since the Chapter 11  
 18 Case's inception and concluding that "the retained professionals are billing hundreds of thousands of  
 19 dollars each and every month." *Id.*

20           Two important points that McAlary fails to mention:

21           *First*, the losses were incurred *under McAlary's management*, who has since resigned.  
 22 Moreover, given that the Debtor has ceased operations, there is *no risk of further operational losses*  
 23 (although, as discussed below, there is a substantial risk that the remaining assets will decline in value  
 24 in the event of a conversion).

25           *Second*, substantial professional fees were incurred in preserving the option of a  
 26 reorganization, based on management's (*i.e.*, McAlary's) insistence that the Debtor's business was

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27           28           <sup>17</sup> See *id.*

1 more valuable as a going concern. For example, regulatory counsel spent considerable time seeking  
 2 to preserve the Debtor's licenses, and bankruptcy counsel spent considerable time selectively  
 3 rejecting host agreements for unprofitable locations, seeking authority to provide employees with a  
 4 KERP, etc. These efforts were justified by the initial term sheet bids (*see, e.g.*, RockItCoin, LLC's  
 5 stalking horse term sheet bid for a reorganization in the \$16 million range<sup>18</sup>). *See* Ayala Declaration,  
 6 ¶ 7.

7       Unfortunately, after the bidders had the opportunity to examine the Debtor's operations more  
 8 closely, many dropped out and those remaining reduced their bids to a fraction (*see, e.g.*,  
 9 RockItCoin's final bid in the \$3 million range<sup>19</sup>). In the end, the market decided that an asset sale  
 10 would provide maximum value to the estate. *See* Ayala Declaration, ¶ 8.

11       Now that the sale has closed, there is no "continuing loss" to the estate, simply the cost of  
 12 liquidating the remaining assets. The Bankruptcy Code clearly "contemplates that a debtor  
 13 corporation may be liquidated in the Chapter 11." *Richter v. Klein/Ray Broad. (In re Klein/Ray*  
 14 *Broad.)*, 100 B.R. 509, 511 (B.A.P. 9th Cir. 1987) (citing 11 U.S.C. § 1123(b)(4)) (affirming denial  
 15 of motion to convert, despite appellants' argument that "case is essentially one of liquidation" and  
 16 "trustee is in a better position to review claims against the estate under such circumstances").

17 **B. Liquidation by the Existing Chapter 11 Professionals is More Efficient and Effective  
 18 Than by a Chapter 7 Trustee.**

19       Liquidation of the remaining assets under the supervision of the current Chapter 11  
 20 professionals will be considerably more efficient and prevent the decline in asset values likely to  
 21 occur upon appointment of a Chapter 7 trustee.

22 **1. Preserve Asset Values.**

23       The following are but a few examples of how the continued supervision by the existing  
 24 Chapter 11 professionals will preserve the remaining asset values:

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<sup>18</sup> *See Notice of Designated Stalking Horse Bidder* [ECF No. 473] & Exhibit 1 thereto.  
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28       <sup>19</sup> *See Amended Notice of Designated Stalking Horse Bidder* [ECF No. 605] & Exhibit 1  
 thereto.

1           **Cash Assets.** The Debtor has more than \$1 million in cash in its deployed DCMs nationwide.  
 2 These cash assets are highly at risk in a Chapter 7 bankruptcy due to (i) complex internal cash  
 3 reconciliation processes, (ii) loss of institutional knowledge and relationships with hosts who can  
 4 become hostile and disruptive to collections, and (iii) increased risk of theft or loss due to delays in  
 5 collections. Losses and theft at high dollar amount locations would likely result in significant  
 6 reductions in cash collected. Ultimately, the Debtor is reliant on its former employees that have been  
 7 hired by the purchaser (Heller Capital Group) and negotiations with Heller Capital's affiliates to  
 8 collect and reconcile the cash amounts in the field timely and efficiently at a fee of only 8% of  
 9 collected cash. This process is severely at risk of disruption in the event a Chapter 7 trustee is  
 10 appointed due to delays in execution and reduced oversight of the cash reconciliation process. *See*  
 11 James Declaration [ECF No. 1079], ¶ 6 & Exhibit 1 thereto.

12           **Insider Claims.** The existing Chapter 11 professionals have amassed extensive knowledge  
 13 of many of the potentially colorable claims<sup>20</sup> against McAlary that might allow recovery from  
 14 McAlary and the Debtor's existing D&O policy, based on actions taken by McAlary before and during  
 15 the Chapter 11 Case. Not only will damages for these claims be more effectively pursued by the  
 16 existing Chapter 11 professionals, but the delay involved in the trustee's getting up to speed could  
 17 adversely affect the collectability of the claims against McAlary, given the extended opportunity to  
 18 spend assets or transfer them to foreign entities. Indeed, the Court has granted standing to pursue  
 19 those claims to the Committee,<sup>21</sup> and the Debtor understands that a complaint will be filed in the near  
 20 term. It is clear that allowing the Committee to pursue these claims to their conclusion will provide  
 21 the most efficient and value maximizing result for the estate. *See* Ayala Declaration, ¶ 9.

22           **Surcharge Claims.** A further example is recovery on the surcharge claims against the  
 23 proceeds of the sale of the secured creditors' collateral. The existing Chapter 11 professionals are

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24           <sup>20</sup> *Order on Opposition to Approval of Stipulation Granting Derivative Standing to the Official  
 25 Committee of Unsecured Creditors with Respect to Certain Actions* [ECF No. 1119] (the "Derivative  
 26 Standing Order"), p. 7 ("For purposes of determining whether derivative standing should be afforded  
 27 to the Creditors Committee in this Chapter 11 proceeding, the court concludes that colorable claims  
 exist.")

28           <sup>21</sup> *See* Derivative Standing Order, approving stipulation by the Debtor to grant the Committee  
 derivative standing to pursue claims against McAlary, among others.

1 not only uniquely situated to explain why their services constituted reasonable and necessary costs of  
 2 preserving and disposing of the collateral, but have already taken the steps to pursue those claims and  
 3 are well underway in the litigation process. Restarting the process would be cost prohibitive. *See*  
 4 Ayala Declaration, ¶ 10.

5 **2. Prevent Added Expense and Delay.**

6 Not only will the continued supervision by the existing Chapter 11 professionals serve to  
 7 protect asset values, but it will also avoid the additional layer of professional fees and delays incurred  
 8 in getting a Chapter 7 trustee and his/her professionals up to speed. For example, Committee counsel  
 9 has expended considerable time and resources researching and amassing evidence supporting breach  
 10 of fiduciary duty and fraudulent transfers claims against McAlary with asserted damages of  
 11 \$25+ million.<sup>22</sup> Transferring this legal and factual database to a Chapter 7 trustee will be a lengthy  
 12 process, with professionals incurring fees on both sides. *See* Ayala Declaration, ¶ 11; *cf. In re All*  
 13 *Am. of Ashburn, Inc.*, 40 B.R. 104, 109–10 (Bankr. N.D. Ga. 1984) (denying motion to convert where  
 14 “potential claim against [secured creditor] represents an asset of the estate which, in the event that the  
 15 Trustee decides to pursue the claim, should be pursued in the most efficient manner. Through the  
 16 efforts of counsel for the Committee and counsel for the Debtors, the Trustee will have the necessary  
 17 manpower and expertise at his disposal. . . . To discard the knowledge of counsel for the Committee  
 18 at this stage could only result in a multiplication of administrative expenses, because the Trustee's  
 19 counsel would have difficulty gaining comparable familiarity with the case during the remainder of  
 20 the bankruptcy proceedings.”)

21 Further, in the wake of the sale closing for considerably less consideration than the secured  
 22 creditors' claims, the existing Chapter 11 professionals are keenly aware of the potential for  
 23 administrative insolvency and the risk of their fees not being paid in full. They have every reason to  
 24 work judiciously and efficiently in overseeing the liquidation of the Debtor's remaining assets. *See*  
 25 Ayala Declaration, ¶ 12.

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28                   <sup>22</sup> *See Exhibit A to Committee Response.*

In short, “[a] Chapter 7 proceeding is generally not the most practical, efficient, expeditious, or most effective manner of liquidating estates.” *In re Haugen*, No. 90-05296, 1990 WL 1239788, at \*2 (Bankr. D.N.D. July 12, 1990) (internal quotation marks omitted) (denying motion to convert where liquidation in Chapter 11 would be required). “If financial realities indicate that liquidation is in order, the Code presents a pragmatic vehicle by which a debtor may remain in possession and oversee the liquidation rather than engaging new parties in the form of a trustee and incurring possibly needless expense.” *Id.* Directly contrary to McAlary’s assertion,<sup>23</sup> the Debtor submits that it is “inconceivable” that the liquidation of the Debtor’s remaining assets by the existing Chapter 11 professionals would not be more efficient and less expensive than by a Chapter 7 trustee.

### III. CONCLUSION

For all the foregoing reasons, the Debtor respectfully requests that the Court deny the Motion in its entirety.

Dated this 30th day of August 2023.

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<sup>23</sup> See Motion, p. 16.